

STATE OF CALIFORNIA
STATE WATER RESOURCES CONTROL BOARD

ORDER: WQ 99 - 01 - CWP

In the Matter of the Petition of
JAMAL KHAN
for Review of a Determination by the
Division of Clean Water Programs,
State Water Resources Control Board,
Regarding Suspension of Wastewater Treatment Plant
Operator Grade II Certificate No. II-4674

BY THE BOARD:

Mr. Jamal Khan (petitioner) seeks review of the Division of Clean Water Programs (Division) Final Division Decision (Decision) proposing to suspend petitioner's Grade II Wastewater Treatment Plant Operator Certificate for a period of six months. The Decision was based on a finding that petitioner had engaged in misconduct during the Grade III Wastewater Treatment Plant Operator Certification Examination held on October 4, 1997. For the reasons set forth below, the State Water Resources Control Board (SWRCB or Board) finds that petitioner engaged in misconduct during the exam, but concludes that a lesser penalty than was proposed by the Division, providing that the suspension will not take effect if petitioner complies with certain conditions specified in this order, is appropriate.

**I. STATUTORY, REGULATORY, PROCEDURAL,
AND FACTUAL BACKGROUND**

Chapter 9, Division 7, of the Water Code governs the certification of wastewater treatment plant operators and supervisors. (Wat. Code, § 13625 et seq.) The Chapter mandates that "[s]upervisors and operators of wastewater treatment plants . . . possess a certificate of the

appropriate grade.” (*Id.* § 13627, subd. (a).) A certificate means “a certificate of competency issued by the [SWRCB] stating that the supervisor or operator has met the requirements for a specific classification in the certification program.” (*Id.* § 13625, subd. (a).) The SWRCB has authority under Chapter 9 to refuse to grant, suspend, or revoke any certificate or place on probation or reprimand a certificate holder upon any reasonable ground including, but not limited to, certain specified activities. (*Id.* § 13627, subd. (e).)

Pursuant to authority granted by statute, the SWRCB promulgated regulations governing the certification of plant operators and supervisors (Operator Certification Regulations). (*Id.* § 13626.) The Operator Certification Regulations provide that “[n]o person shall be issued a certificate unless that person passes a written examination specified by these regulations” (Cal. Code Regs., tit. 23, § 3683, subd. (a).) Examination questions are confidential, and any person who copies questions or removes all or part of any examination from an examination room may be subject to administrative sanctions including reprimand or denial, suspension, probation, or revocation of a certificate. (*Id.* §§ 3701, subd. (e), 3710, subd. (a)(4).)¹ In addition, an applicant who engages in dishonest conduct during an examination

¹ Section 3701, subdivision (e) of the Operator Certification Regulations provides:

“Examination questions are confidential. Any person who copies questions or removes all or part of any examination from the examination room or who conveys or exposes all or part of any examination for an unauthorized use may be denied certification pursuant to the provisions of Article 7. The applicant also may be subject to administrative sanctions pursuant to Article 7 and Section 13627 of the Water Code.”

Section 3710, subdivision (a) of the Operator Certification Regulations provides, in part:

“A certified operator . . . may be subject to administrative sanctions including reprimand or denial, suspension, probation or revocation of a certificate . . . for performing . . . any of the following acts:

....

(Continued)

may be subject to the aforementioned administrative sanctions, and shall have his or her examination materials confiscated, shall not have the examination graded, and shall be denied the opportunity to take the next scheduled examination. (*Id.* §§ 3701, subd. (d), 3710, subd. (a)(4).)² This order addresses whether petitioner's conduct on October 4, 1997, constitutes a violation of the Operator Certification Regulations.

The following is a summary of the pertinent facts.³ The petitioner, Mr. Jamal Khan, is employed by the Los Angeles County Sanitation District as a Grade II Wastewater Treatment Plant Operator. (Petitioner's Exhibit 1 (Khan Exh. 1) at 1; Hearing Transcript (Transcript) at 118:3-6.) On October 4, 1997, the SWRCB held its Grade III Wastewater Treatment Plant Operator Certification Examination at the Rio Hondo College testing site at 3600 Workman Mill Road, Whittier, California. (Division's Exhibit 1 (Div. Exh. 1) at 1.) Petitioner was one of the examinees at the October 4, 1997 examination. (Transcript at 122:5-9.) Mr. Doug Wilson, Mr. John Williams, Mr. Eddy J. Shalaby, and Mr. Doug Hauser proctored the examination. (Div. Exhs. 1 at 1, 6 at 1, 11 at 1.)

On the day of the test, petitioner was provided with instructions on several occasions concerning proper conduct during the examination. First, prior to the 9:00 a.m. start of

"(4) engaging in dishonest conduct during an examination, or violating confidentiality of examination questions."

² Section 3701, subdivision (d) of the Operator Certification Regulations provides:

"An applicant who engages in dishonest conduct during an examination shall have his or her examination materials confiscated, shall not have the examination graded, and shall be denied the opportunity to take the next scheduled examination. The application and examination fees paid by the applicant shall not be refunded. The applicant also may be subject to administrative sanctions pursuant to Article 7 and Section 13627 of the Water Code."

³ References to the hearing transcript contain page and line numbers. The page number precedes the colon and the line number(s) follow the colon. References to exhibits are by party, exhibit number, and page number.

the exam, Doug Wilson posted page three of the instructions provided to the proctors in a prominent place near the check in table. (Div. Exh. 1 at 2.) The third paragraph of that page states that “[n]o other paper (including scratch paper) will be provided or allowed in the examination room.” (Div. Exh. 2 at 3.) Next, at roughly 9:00 a.m., Mr. Wilson read page one of the instructions aloud to the examinees. (Div. Exh. 1 at 2.) Instruction number six on page one reads,

“We have very strict rules on cheating. If you cheat on the examination, your materials will be collected and your examination will be terminated. Cheating includes: communicating in any way with anyone other than a proctor during the examination or while on break. It also includes using notes or other reference material not provided to you by a proctor, or removing examination material from this room.” (Div. Exh. 2 at 1.)

Finally, the cover page of the Grade III Examination reads, “**NOTE:** The removal of any examination material from the examination room, or the reproduction of all or any portion of the examination in any way, may result in revocation of an existing operator certificate and criminal prosecution.” (Div. Exh. 3 at 2.)

The actual testing period began around 9:15 a.m. (Div. Exh. 1 at 2.)

Approximately 25 minutes after the exam started, Mr. Williams entered the men’s restroom.

(Div. Exhs. 6 at 2; Transcript at 52:22-23.) Mr. Williams testified that he noticed one of the stalls was occupied, (Div. Exhs. 6 at 2, 7 at 1; Transcript at 53:8) and that the sound of rustling paper was coming from the occupied stall. (Div. Exhs. 6 at 2, 7 at 1; Transcript at 53:1-2.)

Mr. Williams testified that the sound was not of tissue paper, but a crisp folding sound.

(Div. Exh. 7 at 1; Transcript at 53:18-20.) Mr. Williams also noticed that the individual in the stall was facing the toilet, by the direction of the individual’s feet. (Div. Exh. 7 at 1; Transcript at 54:9-11.) Petitioner had signed out to use the restroom from 9:41 a.m. to 9:45 a.m.

(Div. Exh. 9 at 1.) This time corresponds with the time Mr. Williams testified he was in the restroom. Mr. Williams exited the restroom and waited near the entrance of the testing area to watch who else came out of the restroom. (Div. Exh. 6 at 2.) Mr. Williams observed petitioner exit the restroom and return to his seat. (Div. Exh. 6 at 2; Transcript at 57:3-5.)

Upon his return from the restroom, Mr. Williams indicated to Mr. Wilson that the man returning from the restroom, the petitioner, may have been cheating. (Div. Exhs. 1 at 2, 6 at 2.) Mr. Wilson then relayed the information to Mr. Shalaby, stating that petitioner should be watched. (Div. Exh. 1 at 2; Transcript at 33:14-20.) Mr. Shalaby moved from his location near the registration desk and sat down approximately seven to eight feet from petitioner's table. (Div. Exh. 11 at 2.) Mr. Shalaby testified that he had an unobstructed view of petitioner and that petitioner had only his test and a calculator on his table. (Div. Exh. 11 at 2; Transcript at 73:24-25.) Mr. Shalaby testified that petitioner did not seem to be writing much, but appeared only to be flipping through the pages of his test booklet. (Div. Exh. 11 at 2; Transcript at 75:16-21.) After roughly ½ hour, Mr. Shalaby got up from his seat and went out for a break. (Div. Exh. 11 at 2.) As Mr. Shalaby left his position near the petitioner, both Mr. Williams and Mr. Wilson testified that petitioner watched Mr. Shalaby walk away, and then looked down towards his shirt pocket, raised his head, and looked around the room. (Transcript at 34:20-24, 59:4-10.) Mr. Williams then changed his location so that he had an unobstructed view of petitioner. (Div. Exh. 6 at 3.) Immediately after changing his position, Mr. Williams noticed petitioner reach into his shirt pocket, pull out and begin to read some notes written on a small piece of paper. (Div. Exh. 6 at 3; Transcript at 59:16-25.) Mr. Williams motioned to Mr. Wilson for assistance. (Div. Exh. 6 at 3; Transcript at 60:1-4.) As Mr. Williams approached petitioner, he observed petitioner pushing the paper back into his pocket. (Div. Exh. 6 at 3; Transcript at

59:24-25.) Mr. Williams and Mr. Wilson arrived at petitioner's table, and Mr. Wilson collected petitioner's test booklet and notified him that his examination was being terminated.

(Div. Exh. 1 at 2; Transcript at 43:17.) Mr. Williams then removed one small piece of paper protruding from petitioner's shirt pocket. (Div. Exh. 6 at 3; Transcript at 60:6-15.) Mr. Wilson removed a second piece of paper, also protruding from petitioner's pocket. (Div. Exh. 1 at 2; Transcript at 35:7-13.) Neither Mr. Williams nor Mr. Wilson touched petitioner while removing the paper or used any force in doing so. (Transcript at 60:16-19, 35:14-18.) Petitioner never objected to the seizure. (Transcript at 60:20-21, 35:19-20.)

Following the October 4, 1997 Examination, the SWRCB's Office of Operator Certification received information that petitioner had been referring to notes during the examination. In response to the information, Christopher Stevens and Karen Niiya initiated an investigation into the allegations. (Div. Exh. 12 at 2.) Mr. Stevens reviewed petitioner's test and compared his test with the notes removed from petitioner during the examination. (*Ibid.*) The notes obtained from petitioner were found to contain information relating to problems 50 through 56. (*Ibid.*) Petitioner's notes for problems 50 and 56 contain correct solutions to these problems. (*Ibid.*) Nothing is written in petitioner's examination booklet for these problems, however. (*Ibid.*) Petitioner's notes for problem 52 contain a partially correct solution to problem 52. (*Ibid.*) A partially correct solution to problem 52 is written in petitioner's examination booklet. (*Ibid.*) But the answer petitioner gave for problem 52 on his test was different than the answer he had in his notes. (*Ibid.*) The notes for problems 51, 53, 54, and 55 contain information which is given in those problems on the examination. (*Ibid.*) Petitioner's examination booklet contains only an equation given in the examination booklet for problem 51. (*Ibid.*) Nothing is written in the examination booklet for problems 53, 54, and 55. (*Ibid.*)

In a letter dated March 20, 1998, petitioner was notified by Mr. Wayne Pierson, Chief of SWRCB's Office of Operator Certification, that he had violated subdivisions (a)(1) and (a)(4) of section 3710 of the Operator Certification Regulations and that, absent an appeal, his Grade II Certificate would be suspended for a period of six months. Petitioner appealed the proposed disciplinary action to Ed Anton, Chief of the Division of Clean Water Programs. Mr. Anton reviewed petitioner's appeal and found no information justifying modification of the proposed disciplinary action. Petitioner appealed Mr. Anton's Final Division Decision and requested a hearing.

On February 4, 1999, the SWRCB held an adjudicative proceeding on petitioner's appeal. Key issues raised by the notice of the hearing on the appeal included the following:

1. Whether petitioner, prior to October 4, 1997, willfully or negligently obtained access to the October 4, 1997 Grade III Wastewater Treatment Plant Operator Examination, and if so, whether he willfully referred to notes not provided by the proctors during the examination.
2. Whether petitioner engaged in dishonest conduct during the examination on October 4, 1997, or violated the confidentiality of examination questions.
3. Whether petitioner's Grade II Wastewater Treatment Plant Operator Certificate should be suspended for a period of six months if the Board finds that he committed the alleged acts of misconduct.

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II. CONTENTIONS AND FINDINGS

Contention: Petitioner contends that the seizure of notes from his person during the October 4, 1997 Grade III Wastewater Treatment Plant Operator Certificate Examination was unconstitutional and that the exclusionary rule bars admission of the notes.

Findings: Petitioner's argument that the proctors' removal of notes from his shirt pocket constitutes an unlawful seizure is unpersuasive. The seizure of petitioner's notes falls within the "plain view" exception to the Fourth Amendment requirement for issuance of a warrant before government searches or seizures, and is therefore constitutional. Because the Board finds that the seizure was constitutional, it need not consider the application of the exclusionary rule to these proceedings. (See *Conservatorship of Susan T.* (1994) 8 Cal.4th 1005, 1012 [36 Cal.Rptr.2d 40, 884 P.2d 988] (explaining that "[w]hether the exclusionary rule bars the admission of evidence in a civil proceeding depends, first, on the existence of a search or seizure that violates the protections of the Fourth Amendment of the federal Constitution.").)

The Fourth Amendment to the United States Constitution provides, "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause" (U.S. Const., Amend. IV.) In general, searches and seizures conducted outside the judicial process, without prior approval by judge or magistrate, are unreasonable under the Fourth Amendment. (*Katz v. United States* (1967) 389 U.S. 347, 357 [19 L.Ed.2d 576, 88 S.Ct. 507].) There are, however, a few specifically established and well-delineated exceptions to this general rule. (*Ibid.*) One such exception states that if a government agent is in an area where the agent has a right to be, and sees something in plain view, the observation is not a search, (*Lorenza v. Superior Court* (1973) 9 Cal.3d 626, 634 [108 Cal.Rptr. 585, 511 P.2d 33]) and the ensuing

seizure is not subject to Fourth Amendment strictures. (*Harris v. United States* (1968) 390 U.S. 234 [19 L.Ed.2d 1067, 88 S.Ct. 992].) This exception is commonly referred to as “plain view.” Plain view requires that two elements be satisfied: (1) the government agent must lawfully be in a position from which the evidence is viewed and (2) the incriminating nature of the object must be immediately apparent. (*Horton v. California* (1990) 496 U.S. 128, 128-129 [110 L.Ed.2d 112, 110 S.Ct. 2301].) The phrase “immediately apparent” means probable cause must exist before the seizure to believe the object is evidence of misconduct. (*Arizona v. Hicks* (1987) 489 U.S. 321, 327 [94 L.Ed.2d 347, 107 S.Ct. 1149].) The existence of probable cause must be determined from the totality of the circumstances, focusing upon the facts existing at the time of the seizure as viewed in the light of the agent’s knowledge and experience. (*Illinois v. Gates* (1983) 462 U.S. 213, 230 [76 L.Ed.2d 527, 103 S.Ct. 2317].)

In this case, Mr. Williams and Mr. Wilson were in a position where they had a right to be when they observed the notes protruding from petitioner’s pocket. In fact, it was their duty as proctors to be present at the Rio Hondo testing site on October 4, 1997, and to closely monitor the examinees. In addition, the incriminating nature of the notes was immediately apparent to both Mr. Williams and Mr. Wilson. Mr. Wilson had posted instructions prior to the start of the test plainly stating that “no other paper (including scratch paper) will be provided or allowed in the examination room.” (Div. Exh. 2 at 3.) In addition, Mr. Wilson read aloud a warning that “using notes or other reference material not provided to you by a proctor” was prohibited. (Div. Exh. 2 at 1.) The Grade III Examination distributed to petitioner consisted of twenty-eight 8” x 11” sheets of yellow paper, and one 4” x 11” Scantron form that is white with teal green writing. (See Div. Exh. 3.) The papers petitioner was looking at in his pocket were white with faint blue stripes and roughly 3” x 5” inches in size. (See Div. Exh. 4.) The notes,

even from afar, were obviously not part of the examination provided to petitioner. This, coupled with the fact that roughly 30 minutes prior to seizing the notes, Mr. Williams had observed petitioner in one of the bathroom stalls, facing the toilet, with the sound of rustling paper coming from within, provides probable cause to believe that the papers were incriminating in nature. Petitioner's furtive behavior as observed by the proctors, including apparent efforts to conceal the fact that he was looking at the notes, and returning the notes to his pocket when he discovered he was being observed, further underscore the conclusion that there was probable cause to believe the papers were incriminating.

Because Mr. Williams and Mr. Wilson viewed the notes from a lawful vantage point, and because the incriminating nature of the paper was immediately apparent, we find that no search occurred and that the seizure of petitioner's notes in plain view did not violate the Fourth Amendment.

In his written testimony, petitioner states that during the October 4, 1997 Examination, he was battered by two SWRCB employees who, without consent, performed a body search. This Board finds that no force or violence was used to seize petitioner's notes. The two proctors testified that they did not touch the petitioner when they removed the papers. Although petitioner claims to have been battered, his testimony was vague and conclusory, providing no specifics as to where he had been touched or how forcefully. The presiding officer, who had an opportunity to observe the demeanor of the witnesses, observed that the proctors demonstrated a clear and accurate recollection of the events that transpired, both on direct and

cross-examination, while the petitioner's testimony was imprecise and lacking in credibility. We therefore conclude that no battery occurred.⁴

Contention: Petitioner contends that he did not engage in dishonest conduct during the examination or violate the confidentiality of the examination questions. Petitioner specifically contends that he did not have prior access to the Grade III Wastewater Treatment Plant Operator Certification Examination and that he made the notes during the examination so that he could take them home and work the problems in a more relaxed setting.

Findings: The Board finds that petitioner engaged in dishonest conduct by bringing notes with him to the examination and referring to them during the exam.

The record is inconclusive as to whether petitioner had access to all or a portion of the Grade III Wastewater Treatment Plant Operator Certification Examination before the examination was given. The Division presented no evidence that all or any portion of this or any other Grade III Examination had been stolen or was otherwise missing. It is clear, however, that petitioner had in his possession notes that were relevant to the questions on the exam and that he could not have made the notes during the examination and therefore must have brought the completed notes with him. Further, he referred to these notes during the course of the examination. The instructions presented to the petitioner at the examination regarding proper conduct were unambiguous. Petitioner willfully chose to disregard the instructions and refer to notes not provided to him during the examination. The Board finds that such conduct constitutes

⁴ In addition, petitioner demands the return of his notes, contending that the seizure and subsequent retention of his notes by the Division amounts to conversion. Because the Board finds the seizure of petitioner's notes constitutional, it rejects petitioner's contention. The retention of petitioner's notes is a lawful detention. There has been no conversion. (See Pen. Code, § 1538.5 subd. (e) (stating that "[i]f a search or seizure motion is granted at a trial, the property shall be returned upon order of the court unless it is otherwise subject to lawful detention."))

dishonest conduct under subdivision (a)(4) of section 3710 of the Operator Certification Regulations.

Petitioner's contention that he made the notes during the examination is implausible. Petitioner testified that he wrote the notes while the proctors were distributing the examinations and while he was completing the true/false and multiple choice sections of the exam. (Transcript at 127:12, 132:1-4.) Petitioner's testimony was that he tore out two pieces of note paper from a pad which he had with him at the examination. (Transcript at 128:17-20.) Then, petitioner claims he cut the paper with the blade of a small knife, using a ruler to eliminate the frayed portion and make the edge even. (Transcript at 128:24-25, 129:1-3, 130:5-22.) He testified that he hid the papers in his exam while he wrote the notes. (Transcript at 129:2-7, 131:11-12.) A number of factors, however, undermine the credibility of petitioner's story. First, the notes are written in ink. (See Div. Exh. 4.) Petitioner's examination is written entirely in pencil. (See Div. Exh. 3.) If petitioner took at least some of the notes while he completed the true/false and the multiple choice portions of his exam, it is unlikely he would go to the trouble of alternating writing instruments. Petitioner's explanation as to why he used a pen on his notes and a pencil on the exam was not convincing. He testified that he used a pen for the notes "because I always carry a pen and note pad with me twenty-four hours a day. I had opportunity. I used it. Like if I had a pen in my hand, I just started doing it." (Transcript at 128:6-8.) Second, the cut, top edge of petitioner's notes is wavy. (See Div. Exh. 4.) If petitioner had used a straight-edged ruler and a knife to make the cut, as he testified, one would expect the edge to be straight. It was not. Moreover, the three proctors who testified at the hearing stated either that they did not see petitioner cut a piece of paper with his knife or that the noise created by such

cutting would have been detected. (Transcript at 40:4-10, 50:20-23, 60:22-25, 61:1-8, 76:12-17.)

Third, petitioner's stated intent of copying the problem statements so that he could work the problems at home in a more relaxed setting, (Transcript at 127:19-20) is inconsistent with the contents of the papers taken from the petitioner, which include the solutions for problems 50 and 52, not the problems themselves. (See Div. Exh. 4.) Finally, Mr. Shalaby testified that he closely observed petitioner from the time petitioner returned from the restroom until the notes were seized, and that petitioner was only flipping through his notes, and writing very little, if at all during that time. (Transcript at 74:1-25, 75:1-21.) This indicates petitioner must have completed the entire true/false and multiple choice sections before going to the restroom. Petitioner would have us believe he also managed to complete the notes during this time as well. Such a claim is not credible. There were twenty-five true/false questions and twenty multiple choice questions on the exam; petitioner scored 80 percent and 65 percent on these sections, respectively. (Div. Exh. 13 at 2.) Petitioner's notes contain correct solutions to math problems 50 and 56 on the test, and a partially correct solution to problem 52. It is highly implausible that petitioner would have had time to finish the true/false and multiple choice sections and complete the notes taken from his person (which include two correctly worked math problems) before he went to the restroom.

When taken together, these factors overwhelmingly indicate that petitioner did not make the notes during the examination, but instead brought the notes with him. The Board finds that this conduct amounts to dishonest conduct under subdivision (a)(4) of section 3710 of the Operator Certification Regulations.

On several occasions prior to the actual start of the examination, petitioner received instructions regarding what behavior was proper during the examination. Prior to the

9:00 a.m. start of the exam, Mr. Wilson posted instructions providing that “[n]o other paper (including scratch paper) will be provided or allowed in the examination room.” (Div. Exh. 2 at 3.) In addition, at roughly 9:00 a.m., Mr. Wilson read an instruction aloud to the examinees warning that cheating includes “using notes or other reference material not provided to you by a proctor, or removing examination material from this room.” (Div. Exh. 2 at 1.) While petitioner contends he either did not listen to the instructions or simply could not hear them, (Transcript at 127:24-25, 128:1) the Board finds that the record contains evidence that petitioner knew his actions were dishonest. Indeed, petitioner’s own testimony was that he intentionally hid the notes from the proctors, and that he “was not supposed to write it down on piece of paper.” (Transcript at 129:5-25.) In addition, petitioner was observed by the proctors attempting to refer to the notes concealed in his pocket. (Transcript at 34:22-24, 59:16-25.) Petitioner was clearly warned that referring to notes not provided by the proctors was prohibited, yet petitioner chose to disregard the instructions and refer to notes he brought to the examination. We find that such conduct constitutes dishonest conduct in violation of subdivision (a)(4) of section 3710 of the Operator Certification Regulations.⁵

Contention: Petitioner contends that he is a competent employee with no prior history of misconduct, and that therefore a lesser punishment than that proposed by the Division is appropriate. Petitioner specifically suggests that the punishment be suspended.

⁵ Even if the Board were to find that petitioner had not brought the notes into the examination, petitioner’s admission that he made the notes during the examination with the intent to remove them from the testing site would be considered compromising the confidentiality of examination questions, and a violation of subdivision (a)(4) of section 3710 of the Operator Certification Regulations. Because the Board finds that petitioner brought the completed notes with him to the examination, we need not consider the punishment appropriate for such a violation.

Findings: We agree with petitioner's contention that the punishment recommended by the Division, suspension of his Grade II Wastewater Treatment Plant Operator Certificate, should be suspended. The suspension of his Grade II Certificate should not take effect, provided that petitioner pays a substantial monetary penalty and completes a course of instruction in ethics, and provided that petitioner is also barred from taking the Grade III, IV, or V Exam for a substantial period.

Although the record supports a finding that the petitioner engaged in dishonest conduct during the October 4, 1997, Wastewater Treatment Plant Examination, there is no evidence of any prior misconduct and there is a potential for serious hardship on the petitioner and his family if his certificate is suspended for more than a brief period. Although the Board believes it is important to emphasize the fact that dishonesty in connection with certification examinations will not be tolerated, we conclude that petitioner should be permitted to keep his certification in effect upon condition that he take steps which serve to recognize the seriousness of the violation and a commitment to adhere to high ethical standards in the future.

For the past two years, petitioner's overall work performance has been judged by his supervisors as "very competent." (Khan Exh. 2.) We also note that petitioner's violation occurred in connection with his efforts to advance to a Grade III Operator, not in connection with his current duties as a Grade II Operator. There is no evidence of prior dishonesty, and no indication whatsoever that petitioner's continued employment poses a danger to the waters of this state or to the health and safety of other persons who work in treatment facilities.

Petitioner also presented evidence from which we infer that suspension of Grade II Certification would likely impose a significant hardship on petitioner and his family. Petitioner is originally from Pakistan, immigrating to this country when he was 19 years old.⁶ (Transcript at 117:12-13.) Petitioner has been employed by the Los Angeles County Sanitation District for the past twenty years. (Transcript at 118:7-9.) He has a wife and two children. (Khan Exh. 1 at 2.) Both petitioner and his wife suffer from severe health problems. (See Khan Exh. 1 at 2.) Although no testimony was specifically offered as to whether petitioner would lose his job if his certification were revoked, or whether he could find other work, we note that possession of a valid certificate is required to operate a wastewater treatment plant. (Wat. Code, § 13627, subd. (a); Cal. Code Regs., tit. 23, § 3670.1.)

While we find petitioner's conduct in this case fell far short of what we would expect of a Grade II Certified Operator, we have determined that the mitigating circumstances dictate a more lenient penalty than absolute suspension. At the same time, we conclude that it would undermine the integrity of the operator certification program if a serious, proven violation

⁶ In closing argument, petitioner's attorney contended that petitioner should not be punished harshly for dishonesty because the system of ethics in Pakistan differs from that in the United States. (Transcript at 156:1-10.) The attorney offered no explanation as to what these ethical differences might be or how they might explain petitioner's behavior. There is no evidence in the record to support the attorney's claim. The only evidence in the record that is even arguably relevant to the claim was petitioner's brief statement, in response to questions from his attorney, that honesty was an important tenet of his religion, (Transcript at 121:21-25, 122:1-4) testimony that, if anything, would tend to undermine his attorney's suggestion that petitioner's cultural background somehow explains dishonest behavior. While we are not insensitive to the potential for misunderstandings as a result of cultural differences, we find no basis in his attorney's unsubstantiated speculation about cultural differences for treating petitioner differently from persons from other backgrounds.

Petitioner also submitted character references from a large number of acquaintances, including many who, because they share the same last name, may be relatives of the petitioner. (Khan Exh. 4.) Most of these references are similarly or identically worded. Although these references may be considered in determining what remedy is appropriate for petitioner's violation, as evidence of good moral character, they are not very convincing and should be given very little weight in determining whether the specific charges of dishonesty by the petitioner are valid.

of testing requirements were to go without serious consequences. Accordingly, we conclude that petitioner's Grade II Certification should be suspended, but that the suspension should not take effect if petitioner pays a \$500 fine and completes a course of instruction in ethics. These requirements will help underscore the importance of honest behavior by certified operators, while avoiding undue hardship on the petitioner.

In addition, we conclude that petitioner should be prohibited from taking the Grade III, IV, or V Wastewater Treatment Plant Operator Certification Examination for thirty-six months following the date of this order. While this punishment differs from that recommended by the Division, we conclude that such a penalty better addresses petitioner's dishonest conduct, which occurred in connection with his taking of the Grade III Examination, and not in connection with his ongoing performance as a Grade II Operator.⁷

III. SUMMARY AND CONCLUSION

After a review of the record and consideration of the issues raised by the petitioner, and for the reasons previously discussed, we conclude as follows:

1. The notes seized from petitioner during the examination were taken in plain view and not in violation of the Fourth Amendment.
2. The evidence is sufficient to support a finding that petitioner engaged in dishonest conduct during the October 4, 1997 Grade III Wastewater Treatment Plant Operator

⁷ Subdivision (d) of Section 3701 of the Operator Certification Regulation provides that an applicant who engages in dishonest conduct, among other things, shall be denied the opportunity to take the next scheduled examination. This provision establishes a mandatory, minimum penalty. It does not bar the Board from imposing additional penalties where appropriate. Subdivision (d) of section 3701 expressly provides that an applicant who engages in dishonest conduct during an examination may be subject to administrative sanctions pursuant section 13627 of the Water Code. Section 13627 of the Water Code provides the Board authority to refuse to grant any certificate upon any reasonable ground. Our imposition of a thirty-six month suspension on petitioner's taking the Grade III, IV, or V Examination, effectively, is a refusal to grant petitioner a Grade III, IV or V Certificate for a specified period.

Certificate Examination when he referred to notes not provided by the proctors during the examination.

3. The record contains mitigating evidence concerning the degree of petitioner's culpability dictating a more lenient penalty than absolute suspension of petitioner's Grade II Certificate for a period of six months.

IV. ORDER

IT IS THEREFORE ORDERED that petitioner shall be prohibited from taking the Grade III, IV, or V Wastewater Treatment Plant Operator Certificate Examination for a period of 36 (thirty-six) months from the date of this order. In addition, petitioner's Grade II Certificate shall be suspended for a period of six months, provided that the suspension of petitioner's certificate shall not take effect if both of the following conditions are satisfied:

(1) petitioner pays a fine of \$500 to the SWRCB within 90 (ninety) days of this order; and

(2) petitioner completes an ethics course, approved by SWRCB's Executive Director, with a grade of C or better within 18 (eighteen) months of this order. If petitioner enrolls in but fails to successfully complete the course within 18 months, he shall be afforded an additional 6 (six) months to retake and successfully complete the course. If petitioner still fails to complete the

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course within this time period, the six month suspension of petitioner's Grade II Certificate will take effect immediately.

CERTIFICATION

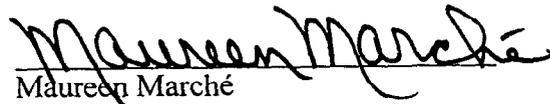
The undersigned, Administrative Assistant to the Board, does hereby certify that the foregoing is a full, true, and correct copy of an order duly and regularly adopted at a meeting of the State Water Resources Control Board held on March 18, 1999.

AYE: James Stubchaer
Mary Jane Forster
Marc Del Piero
John W. Brown

NO: None

ABSENT: None

ABSTAIN: None


Maureen Marché
Administrative Assistant to the Board

